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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-1806

DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and
JOSE BONILLA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JOSE BONILLA IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly decided that under Cuyler v. Sullivan Respondent Bonilla has been denied the effective assistance of counsel under the sixth and fourteenth amendments because Bonilla was represented at trial by counsel whose obligations to the jointly represented codefendant compelled him to subordinate Bonilla's individual interests to the collective interests of the group and prevented counsel from putting forward the strongest possible defense for Bonilla.

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OPINIONS BELOW

The order of the Court of Appeals and the opinion of the District Court for the Southern District of New York appear in the Appendix to the Petition. The Magistrate's report is appended to this brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments VI and XIV. The text appears in the Petition at 2-3.

STATEMENT OF THE CASE

The respondents were indicted, inter alia, for intentional murder. N.Y. Penal Law §125.25(1)(McKinney 1975). In January 1974 they went to trial before the Honorable William Kapelman, J.S.C., and a jury, represented by a retained attorney, Stanley L. Siegel, Esq.

The prosecution witnesses, the family and friends of the deceased, established that the deceased engaged in a fight with the respondents. Medical evidence showed that the deceased received a single fatal stab wound, a bruise, and an abraded lip during the fight. None of the witnesses saw the stabbing occur, and no clear picture of the sequence of events or of the role of each respondent emerged. The prosecutor conceded that he could not prove who inflicted the fatal wound and asked for a guilty verdict if the jury were convinced that the respondents acted as accomplices to cause the death of the victim (T. 90, 101, 197, 162, 201, 220, 229, 263A-265; RA. 3-5).*

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*Numbers prefaced by "T" refer to the trial transcript; by "RA" to the Appendix to Respondent Bonilla's brief; and numbers followed by "a" refer to the Appendix to the Petition.

Respondent Bonilla, the only defense witness, identified the victim as the initial aggressor. Bonilla denied being armed with a knife, and did not believe his friends were either (T. 302-04, 366-69, 371-72). The jury convicted the three of intentional murder. On March 12, 1974, Bonilla received the minimum sentence of 15 years to life on the murder conviction.

Bonilla appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued, inter alia, that he had been denied the effective assistance of counsel, because his individual interests were subordinated to the collective interests of the group, and because counsel was unable to shape Bonilla's defense according to the evidence at trial. He also contended that he had not waived his right to separate counsel. The District Attorney did not dispute this contention and responded only that Bonilla was not prejudiced by the joint representation. The judgment of conviction was affirmed by the Appellate Division on February 15, 1977. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel on April 14, 1977.

Subsequently, Bonilla petitioned for a writ of habeas corpus in the Federal District Court for the Southern District of New York, as had his codefendants. Respondent Bermudez's petition included the affidavit of defense counsel alleging that before trial in an off-the-record conference counsel had informed the judge that a conflict existed and had requested that his clients have separate counsel, and that the judge replied that this was a "stalling tactic." In response the prosecutor affirmed that it was the judge who raised the question. The judge affirmed that he had raised the issue during a conference in chambers and had instructed counsel to discuss the matter with respondents. Subsequently, counsel assured

him that respondents were satisfied with joint representation.

The petitions of Bermudez and Laureano were referred to a Magistrate. The Magistrate issued a report recommending that the writ be granted in which she specifically concluded that the allegations of the trial judge, if accepted, did not make out consent to the joint representation (RA. 15-17). After the issuance of the report the trial judge submitted a second affidavit in which he alleged that he had inquired of counsel in the presence of respondents whether they had been advised of the risks of joint representation, and further, that he "believed" that he had asked respondents personally whether they wished to proceed jointly represented.

The District Court adopted the findings of the Magistrate, and deemed them applicable to Bonilla. Alluding to both affidavits of the trial judge in the course of deciding that respondents had exhausted their state remedies (an issue petitioners have abandoned in this Court)(6a-7a), the District Court concurred with the Magistrate that respondents were perjudiced by the joint representation and granted the writs.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, raising the same issues of lack of prejudice and failure to exhaust state remedies they had in the District Court. On November 26, 1979, that Court summarily affirmed the granting of the writ on the opinion of the District Court.

Petitioner sought a writ of certiorari. On May 27, 1980, this Court granted the writ, vacated the order below, and remanded for reconsideration in light of Cuyler v. Sullivan, 446 U.S. 335 (1980). On March 11, 1981, the Court of Appeals again affirmed the order of the District Court granting the writs of habeas corpus (2a-3a).

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly found under Cuyler v. Sullivan, 446 U.S. 335 (1980), that Respondent Bonilla's defense was adversely affected by an actual conflict of interest. The only defense available to all three defendants was that none of them did the stabbing; and as the Court of Appeals (3a), the District Court (10a-11a), and the magistrate (RA. 24-25) all concluded, on the facts of this case that was no defense at all.

The strength of the prosecution's case lay in the irrefutable testimony placing the three respondents at the scene and establishing that one of them must have fatally wounded the victim. The weaknesses lay in the lack of proof as to which respondent actually inflicted the wound and when it happened; in the confused and contradictory accounts of the event given by the witnesses; and in the need to rely on varying accounts of each respondent's conduct at the scene to establish that he intended to commit murder.

In the factual and legal posture of this case, Bonilla's only viable defense was to convince the jury that his conduct at the scene demonstrated that he had neither killed nor intended to kill the victim and that one of the others must have. However, counsel avoided clarifying the sequence of events and isolating the conduct of any of his clients, because of the severe risk that limiting the participation of one defendant would redound to the disadvantage of another.

As this Court has recognized, jointly represented defendants may suffer because of what their attorney is prevented from doing. Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). Consequently, a prejudicial conflict exists when an attorney representing several defendants cannot put forward on behalf of one of them a defense based on the evidence at trial, because it would harm the interests of another. Foxworth v.

Wainwright, 516 F.2d 1072 (5th Cir., 1975); Austin v. Erickson, 477 F.2d 620, 623-26 (8th Cir. 1973); and Robinson v. Parratt, 421 F. Supp. 664, 670-72 (D. Neb.), aff'd, 546 F.2d 764 (8th Cir. 1976). See Smith v. Regan, 583 F.2d 72, 77 (2d Cir. 1978); and United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.), cert. denied, 429 U.S. 998 (1976). It exists when an attorney cannot cross-examine a witness on behalf of one client because of his responsibilities to another. Glasser v. United States, 315 U.S. 60, 72-73 (1942). See Kaplan v. Bombard, supra, 573 F.2d 708, 713 (2d Cir. 1978); and United States v. Bernstein, supra, 573 F.2d at 788. It also exists when counsel should and does not distinguish the position of one defendant and dissociate him from the others because of counsel's divided loyalties. United States ex rel. Hart v. Davenport, 478 F.2d 203, 208-10 (3d Cir. 1973); and Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965). Bonilla's defense was adversely affected in each of these ways. In short, his counsel was unable to discharge his primary obligation of putting forward the strongest possible defense for his client.

Petitioners accuse the Court of Appeals of judicial speculation (Petition 8) in holding that an actual conflict adversely affected Bonilla's representation and fault that court for citing no specific examples of prejudice from the state trial. Petitioners conveniently ignore the Court of Appeals' adoption of the magistrate's specific and detailed findings (RA. 21-25) of an actual conflict. Implicit in the petition is a recognition that petitioners cannot seriously challenge the finding of an actual conflict, because petitioners have not sought review on this ground.

The futility of challenging the finding of an actual conflict has forced petitioners to metamorphose their claim into one that Bonilla waived his right to contest the joint repre-

sentation, because he consented to it. Petitioners have done an about-face from the position they adopted in the state courts. Bonilla specifically argued in the state courts that he had not waived his right to separate counsel. Petitioners did not dispute that assertion (9a, n.1).

Now petitioners contend that they can show a waiver. Assuming for the purposes of argument that Bonilla could have waived his right to separate counsel, see Wood v. Georgia, ___ U.S. ___, 49 U.S.L.W. 4218 (March 3, 1981), and taking the allegations of the trial judge at their strongest and putting aside the contrary allegations of defense counsel, petitioners cannot demonstrate a waiver. The cursory, off-hand, off-the-record inquiry described by the trial judge does not satisfy the constitutional standard of a knowing an intelligent waiver of a known right. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). See Cuyler v. Sullivan, 446 U.S. at 350-54 (concurring opinion of Brennan, J.).

So little attention was paid by the trial judge to the inquiry that it was not until he filed a second affidavit in response to the magistrate's criticism that he recealled he may have spoken directly to respondents. There are no allegations from either counsel or the court that Bonilla was given an explanation of what constitutes a conflict of interests, of how his interests might conflict with those of his codefendants, or of the consequences of proceeding with the joint representation.

Specifically, Bonilla was not warned that the intended unified defense might prove to be no defense at all, as the court below found; nor was he advised of possible alternate defenses. There simply was no "voluntary" choice to proceed jointly represented, as petitioners claim. This record does not establish, and no court has found, that Bonilla waived his right to separate counsel. Consequently, the decision of the Court of Appeals is not in conflict with any of the deci-

sions of this Court or with the decisions cited in the petitions at 7.

Finally, there was no improvident exercise of habeas corpus jurisdiction. If petitioners had wanted a hearing in the state courts on the waiver question, they should have sought it while the case was before those courts. In fact, petitioners passed up two opportunities to seek a hearing.* If a hearing were necessary in this case, petitioners would be solely responsible for there having been none. It is too late now, on this second petition for a writ of certiorari, for petitioners to ask for a hearing in the state courts on waiver grounds.

In sum, the court below correctly decided that the unified defense was no defense at all for Bonilla. On no view of the facts can Bonilla be said to have waived his right to separate counsel.

CONCLUSION

FOR THE ABOVE REASONS, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

DIANA BUDZANOSKI
WILLIAM E. HELLERSTEIN
Attorneys for Respondent
Jose Bonilla

May 15, 1981

*Before the direct appeal was perfected in the state courts the District Attorney and the office of the trial judge were advised that Bonilla intended to raise the conflict issue. In an effort to determine whether the trial judge had made an inquiry as required by People v. Gomberg, 38 N.Y.2d 307 (1975), counsel moved to have the record enlarged to include pretrial appearances. In response the District Attorney did not suggest that a waiver had occurred off the record. When Bonilla contended on appeal that there was no waiver, the District Attorney did not dispute this contention, nor did he assert that the record was inadequate and a hearing necessary. See People v. Rivera, 62 A.D.2d 767 (1st Dept. 1978).

APPENDIX A

Magistrate's Report and Recommendation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA ex rel FERNANDO BERMUDEZ,

Petitioner,

- v -

LEON J. VINCENT, WARDEN, GREEN HAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondent.

REPORT AND RECOMMENDATION

77 Civ. 2048 (MEL)

- x

JOSE LAUREANO,

Petitioner,

- v. -

SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY AND DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

78 Civ. 1023 (MEL)

- x

These petitions for writs of habeas corpus have been referred to me by the Honorable Morris E. Lasker, District Judge. The two petitioners were codefendants in the state court trial here challenged and they present virtually identical claims. Accordingly, a single report is being submitted for both cases.

Petitioners and another defendant, Bonilla, were charged with acting in concert to commit a variety of crimes.

On March 12, 1974, following a trial by jury, all three were convicted in the Supreme Court of the State of New York, Bronx County, of murder and possession of a weapon. Each was sentenced to concurrent terms of 15 years to life imprisonment and one year imprisonment. On petitioners' appeals to the Appellate Division, their convictions were affirmed without opinion. People v. Bermudez, 46 AD2d 1014 (1st Dept. 1974); People v. Laureano, 46 AD 2d 1014 (1st Dept. 1974). Each petitioner's application for leave to appeal was denied on January 22, 1975.

All three defendants retained Siegel & Graber, Esqs. to represent them on the charges; Stanley Siegel acted as defense counsel at the trial. The claims in the habeas petitions presently before the Court arise out of this joint representation.

The prosecution's position was that the three defendants, who were 19 or 20 years old, had fought with William Travieso, age 16, in the street outside of Travieso's home and that one of them stabbed him, causing his death. It was undisputed that Travieso died of a single stab wound. The prosecutor did not know who had actually inflicted that wound, so his case proceeded on the theory that, since the charge was "acting in concert", the State did not have to

establish which of the defendants had stabbed Travieso. The prosecutor agreed that, if all the defendants pleaded guilty, he would recommend to the Court a sentence of four to twelve years imprisonment for one defendant and much shorter sentences for the other two defendants. Bermudez pet. ¶¶ 9, 15; Epstein aff. attached to pet. ¶¶ 4, 5; Bermudez aff. ¶¶ 8, 9.

At the trial, the testimony of the witnesses as to the involvement of each of the defendants varied. Thus, of the seven prosecution witnesses who testified that they witnessed the fight, several identified Bonilla as having been on top of Travieso and as having had a knife. For example, Angel Torres, testified that he saw Bonilla getting up from Travieso's body with a knife in his hand (143, 161*). Other witnesses identified petitioner Bermudez as having a knife and having been on top of Travieso. For example, Theodoro Travieso testified that Bermudez was on top of Travieso making a "rubbing motion" (100, 106-107) and that when Bermudez was pulled away he took out a knife (115-116). Although one witness identified petitioner Laureano as having a knife (251), and another

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* Unless otherwise indicated, numbers in parentheses refer to pages of the trial transcript.

identified him as being involved in the initial fist fight (31), no one identified him as ever having been on top of Travieso either with or without a knife.

The only defense witness was defendant Bonilla. Bonilla testified that Travieso had started a fight with him as Bonilla was walking down the street with Bermudez and Laureano (299-300, 302, 356-357). According to Bonilla, other people joined the fray; some, including one with a knife, bore weapons (303). Bonilla further testified that none of the defendants had a knife (304, 371-372), that only he, among the defendants, had participated in the fight with Travieso (300-303), and that Laureano had been yelling for the fight to stop (303). On cross-examination, Bonilla's testimony was impeached by a statement he had previously given to an assistant district attorney in which he had denied being at the fight at all (326-334).

As already noted, the prosecutor did not attempt to establish who did the actual stabbing. He presented the State's case on the theory that the State did not have to prove who stabbed Travieso so long as the evidence satisfied the jury that one of the defendants had done so and that the defendants

were acting in concert (see for example the prosecutor's summation at 408-409). As to each of the defendants, the trial court submitted to the jury the charge of acting in concert to commit murder, the lesser included offense of manslaughter in the first degree, and the misdemeanor, possession of a weapon. The court charged that in order for the jury to convict the defendants, or any of them, of acting in concert to kill Travieso, it was not necessary for them to determine which of the defendants had done the actual killing (452).

Approximately three hours after the jury had begun to deliberate, it sent the following note to the trial court (487):

> "One. What constitutes acting in concert. Explain in detail.
>
> "Two. Repeat definition of intent. Please explain in detail."

The Court then re-explained these concepts. While doing so, it made the following remark (490): "As evidence in this case may indicate, the degree of participation of each defendant is not the same in the alleged crime, especially in the killing of William Travieso. Obviously, only one knife went into his body. So therefore, only one of the three could have been . . . the actual killer." Approximately

45 minutes after the jury returned to its deliberations, it brought in its verdicts that all three defendants were guilty of murder and possession of a weapon (497, 502-504).

Bermudez and Laureano argue that the representation of all three defendants by the same attorney violated their Sixth Amendment right to adequate representation by counsel. In essence they make two arguments. The first is that they were prejudiced by the "all or nothing" defense which was made, because such a defense required the jury to believe that Travieso was killed by one of his own family or friends and therefore was utterly ineffectual. The second is that, because he represented all three defendants, and could abandon none of them, counsel was precluded from developing effective defenses, such as disassociating one defendant from the others, distinguishing among the degree of participation of each and shifting the blame from one to the others. Bermudez also alleges that he was prejudiced at the plea bargaining stage because the joint attorney had to remain neutral during those proceedings and could not be effective as to each individual.*

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* Laureano also alleges prejudice from the failure of defense counsel to request charges to lesser offenses. Counsel for Laureano has not seriously urged this point and, since it does not appear how joint representation could have affected counsel's decision not to request charges to lesser offenses, this allegation need not be discussed.

These cases present two main issues for decision, namely, whether the petitioners exhausted their state remedies and whether they were prejudiced by joint representation. This report will begin with a general discussion of the petitioners' claim because an understanding of their claim is necessary to a decision on the threshold issue of exhaustion.

Joint representation of criminal defendants has received close scrutiny and much disapproval in recent years. See for example the discussion in United States v. De Filippo, _____ F.2d _____ (2d Cir., Docket Nos. 78-1217-18, decided Jan. 8, 1979), slip opin. at 840-843. The petitioners rely on the line of cases establishing that, where there is joint representation of criminal defendants, the trial court has the responsibility to make inquiry as to the existence of possible conflicts of interest, to personally advise the defendants of such possible conflicts and to allow the defendants to express their views. United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976), and cases cited therein. In this Circuit, if there has been such an

inquiry, and the joint representation continues, the defendants have the burden of establishing that the joint representation resulted in "some specific instance of prejudice". Salomon v. LaVallee, 575 F.2d 1051, 1054 (2d Cir. 1978); Kaplan v. Bombard, 573 F.2d 708, 712 (2d Cir. 1978); United States v. Carrigan, supra, 543 F.2d at 1055. If there has not been such an inquiry, the burden shifts to the prosecution to show lack of prejudice. See, e.g., United States v. Carrigan, supra, 543 F.2d at 1056; United States v. DeBerry, 487 F.2d 448, 453 n.6 (2d Cir. 1973).

The shifting burden principle applies in cases challenging state convictions as well as in cases on direct review. In Salomon v. LaVallee, supra, 575 F.2d at 1055, the Court of Appeals, citing Kaplan v. Bombard, supra, 573 F.2d at 714 n.7, noted that it had "recently indicated, without discussion, that this standard should be applied in collateral review of convictions as well as on direct appeal." See also Mone v. Robinson, 430 F.Supp. 481, 484 (D. Conn. 1977). The Court in Salomon found that no such inquiry had been made as to Salomon and remanded the case "for a reconsideration

of the issue of prejudice, with the burden this time on the state to show its absence and not, as in the decision appealed from, on appellant to demonstrate its existence". 575 F.2d at 1055.* The Court then stated that the issue of allocating the burden of proof in cases challenging joint representation at state trials would not be "ripe for decision" unless the state were unable to show an absence of prejudice. Id. However, in view of the remand, the District Court must at this time assume that the shift in burden does apply to cases challenging state convictions.**

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* On remand, the District Court (Goettel, J.), in a decision dated February 16, 1979 (Docket No. 76 Civ. 1640), found that the prosecution had sufficiently established the absence of prejudice.

** A more recent Court of Appeals decision has left the law on this point unchanged. In Smith v. Regan, 583 F.2d 72, 77 (2d Cir. 1978), the Court held that, assuming the burden had shifted to the prosecution, there was no conflict or prejudice from the joint representation.

EXHAUSTION OF STATE REMEDIES

It is indisputable that each petitioner presented to the state courts the claim that his constitutional right to the effective assistance of counsel was violated by the joint representation of all three defendants at the trial. See Bermudez's Brief to Appellate Division, pp. 12-15, attached as Exhibit 1 to Petition; Laureano's Brief to the Appellate Division, pp. 19-22, attached to letter from Laureano's counsel dated November 27, 1978. Both briefs raise squarely the issue of the trial judge's obligation to inquire into potential conflicts of interest and cite the leading case on the subject at that time, United States v. DeBerry, supra, 487 F.2d 448.*

However, the respondents urge that the petitioners must resort to the state courts a second time because they

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* There is one variant in the claim presented here from the claim made in the state courts. Here Bermudez points to prejudice in the plea bargaining stage, although he did not specify such prejudice in the state courts. Laureano's counsel "has not alleged prejudice in the plea bargaining stage out of an abundance of caution as to the exhaustion doctrine . . . ." Laureano Post-Argument Mem. of Law at 7 n.2. Under the principle of Smith v. Regan, supra, 583 F.2d at 75 n.1, the addition of a new illustration of prejudice does not require a return to the state courts. In Smith, the Court concluded that there was exhaustion even though "[n]ot all the particular instances of conflict raised in Smith's habeas petition were presented to the state courts . . . ."

are now presenting new facts which significantly affect their claim.

The new facts appear in various affidavits submitted by Bermudez and, in response, by the State.* Stanley L. Siegel, the petitioners' trial attorney, states that in an off-the-record pre-trial conference he informed the trial judge that there was a conflict of interest between the defendants requiring separate counsel and that this request was rejected as a "stalling tactic". Siegel Aff. ¶ 6, attached to Bermudez petition. The trial judge, William Kapelman, in an affidavit submitted by the respondents, says that it was he who raised the issue of conflict with Siegel, that Siegel advised him there was no problem, that he (Justice Kapelman) nonetheless told Siegel to discuss the question of conflict with his clients and that Siegel later reported that he had done so and that his clients wished him to continue to represent all three. Kapelman Aff. ¶¶ 4-6, attached to Gambale Aff. William Quinn, who

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* In the Laureano case, the respondents initially conceded that, since no such new material was submitted on behalf of Laureano, there had been exhaustion as to him. See Feinberg Aff. ¶ 5; Resp. Mem. of Law at 3. However, on oral argument, counsel for Laureano asked that the record in the Laureano case be expanded to include the new material (apparently in order to take advantage of whatever support such material might lend to Laureano's position on the merits). Accordingly, on the exhaustion issue, the two petitioners are now in the same position.

was the prosecutor, states that Siegel never, either before or during the trial, raised the issue of conflict and that the trial judge himself raised it with Siegel at an off-the-record conference. Quinn Aff, ¶¶ 3-4, attached to Gambale Aff. Petitioner Bermudez says that defense counsel never discussed with him any problem from joint representation. Bermudez Aff. ¶ 7. It is undisputed that no discussion of possible conflicts of interest was ever had on the record. It is also undisputed that at no time did the trial judge himself address the defendants, as a group or individually, about their joint representation. —

Exhaustion of state remedies has not occurred unless a petitioner has "fairly presented" his federal constitutional claim to the state courts. Picard v. Connor, 404 U.S. 270, 275-276 (1971). If the new facts presented on these petitions do not "materially alter the claim or crucially affect its determination", the petitioners need not resort to the state courts for a second presentation of their claims. Anderson v. Cassclas, 531 F.2d 682, 684 (2d Cir. 1976). The petitioners presented to the state courts the identical claim made here: the trial judge had an obligation to inquire into potential conflicts; and they cited to the state courts a case (United States v. DeBerry, supra, 487 F.2d 448) spelling out that obligation, which was decided a year before petitioners' trial.

Since the petitioners specifically alleged in the state courts, and allege here, that the trial court had a duty to speak to them about potential conflicts and to give them an opportunity to express their views, nothing in the affidavits presented to this Court significantly alters their claim. Neither the allegation by defense counsel that he raised the issue with the judge nor the allegation by the petitioner that defense counsel did not discuss the issue with him materially adds to the claim, nor critically affects its determination.* Under these circumstances, the state courts have had a fair opportunity to review petitioners' claim.

Moreover, even if the new facts did materially alter the claim or affect its determination, a second resort to the state courts is unnecessary. Where resort to the state courts clearly would be futile, because those courts have had a recent opportunity to consider the identical claim, a petitioner need not resort to the state courts before obtaining federal habeas relief. United States ex rel Sero v. Preiser, 506 F.2d 1115, 1130 (2d Cir. 1974), cert. denied sub. nom. Preiser v. Sero, 421 U.S. 921 (1975). See Salomon v. LaVallee.

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* The new facts do not materially affect the respondents' position either. As shown infra at 15-17, even under the facts set forth by Justice Kapelman, whatever inquiry occurred was insufficient to establish consent.

supra, opin. of Goettel, J. dated Feb. 16, 1979 at 6-7. In a submission dated November 27, 1978, counsel for Laureano shows that, on Bonilla's appeal to the Appellate Division, and as part of Bonilla's attack on joint representation, the Court was presented with the very allegation presented here by the petitioners, namely, that Siegel advised the trial court at an off-the-record pre-trial conference that there was a conflict of interest among the defendants and that the Court responded that Siegel was merely trying to delay the trial. Counsel notes that, with this allegation before it, the Appellate Division affirmed Bonilla's conviction without opinion and without remanding for a hearing. People v. Bonilla, 56 AD2d 740 (1st Dept. 1977), lv. denied, 42 NY2d 826 (1977). The respondents' sole opposition to reliance on the record made in the Bonilla case is that the Appellate Division panel may have differed in that case from the panel in Hermudez and Laureano. Such a difference, if there were one, would not be a sound basis for requiring a second resort to the state courts.

PREJUDICE

The preliminary question as to prejudice is whether it must be proved by the petitioners or disproved by the respondents. Since the burden shifts to the prosecution only where the inquiry into possible conflicts of interest has been insufficient (see discussion supra at 7-9), we must examine the nature of the inquiry required. In Kaplan v. Bombard, supra, 573 F.2d at 715 n.9, the Court of Appeals indicated that the same degree of inquiry necessary in federal cases, where the Court's supervisory powers as well as the defendant's constitutional rights are in issue, will not be required in collateral reviews of state convictions, where the Court's powers are more limited. However, as indicated by Kaplan, a state trial court must conduct a sufficient inquiry to satisfy itself that the defendant knowingly consented to joint representation after having been advised by the court of the risks from such representation.

In Kaplan, the trial judge conducted a hearing, on the record, as to the joint representation. The judge addressed the three defendants in the presence of counsel

"to determine if they viewed their defense 'as being in conflict or that there might be a conflicit of interest with respect to any attorney that represents all three of you'". Kaplan, supra, 573 F.2d at 711. The judge did not address Kaplan personally or obtain his express consent to joint representation on the record, but rather relied on counsel's representations, made in Kaplan's presence, that no conflict existed. The Court of Appeals held that, under the facts of that case, the failure of the trial court to address Kaplan personally and to elicit a response from him on the record did not preclude a finding of consent to joint representation. Kaplan, supra, 573 F.2d at 714. In so holding, the Court noted that Kaplan "was warned specifically about a possible conflict by the trial judge", that he had been offered the opportunity to obtain separate counsel and that, although he had heard defense counsel report his consent to joint representation, he had not objected to such representation either during the pre-trial inquiry or during the trial. Kaplan, supra, 573 F.2d at 714-715.

The respondents rely on the affidavit of Justice Kapelman, described supra at 11, as showing that there was an inquiry sufficient under Kaplan to establish consent to the joint representation. But the circumstances alleged here do not remotely approximate the requirements of Kaplan. All that Justice Kapelman's affidavit describes is his off-the-record request that counsel discuss the issue with his clients and his reliance on counsel's later statements, also not on the record, that after the requested discussion, they reaffirmed their consent to joint representation. There is no claim that Justice Kapelman himself ever addressed the defendants, either singly or together. Nor is there any claim that Justice Kapelman relied on representations of counsel made in the presence of the defendants.

Accordingly, the burden is on the State to establish the absence of prejudice. As noted by Judge Goettel in his recent decision in Salomon, supra, it is difficult to determine the exact nature of that burden and to determine

whether in a given case it has been met.* See slip opin. at 9-15. Here, however, such issues are only of academic interest since, even were the burden on the petitioners to prove prejudice, they have amply met that burden.

The respondents' position that the petitioners were not prejudiced by joint representation rests on two arguments. One is that, since the three defendants presented a unified, consistent defense at the trial, there was no prejudicial conflict of interest between them. The other is that the claim of prejudice is improperly based on mere speculation as to what independent trial counsel might have done.

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* Judge Goettel assumed that the burden on the State would have to be met "by a preponderance of the evidence", citing United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972), which is the First Circuit case followed by this Circuit when it adopted the shifting burden principle. See slip opin. at 13. The Court of Appeals for the Second Circuit has not specifically stated what standard applies to the State's burden. Some courts have required that lack of prejudice be established beyond a reasonable doubt. See, e.g., Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967). Since the examination into whether a trial error of constitutional dimensions has not caused prejudice is, in effect, an application of the harmless error rule (see Holloway, supra, 435 U.S. at 487-491), the reasonable doubt burden appears to be the appropriate one to apply. See Chapman v. California, 386 U.S. 18 (1967); Lollar v. United States, supra.

It is true that the defendants presented a unified, consistent defense at the trial. It is also true that mere speculation that independent counsel would have pursued alternative defenses is not a proper basis for a finding that joint representation was prejudicial. See, e.g., United States v. Wisniewski, 478 F.2d 274, 284 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769, 774 (2d Cir.), cert. denied sub nom. Lovano v. United States, 397 U.S. 1071 (1970). But not all claims as to alternative defenses may be dismissed as mere speculation. As noted in Wisniewski, supra, the Court of Appeals is not saying that post-trial assertions of what independent counsel could have done "are to be ignored. Each case must, of course, be viewed on its own facts". Similarly, it is incorrect to say that prejudice can be manifested only by conflicting defenses at trial as occurred in the cases relied upon so heavily by the respondents, namely, United States v. Carrigan, supra, 543 F.2d 1053, where one defendant gave testimony which directly contradicted his codefendant's statement to the FBI, and United States v. DeBerry, supra, 487 F.2d 448, where one defendant testified that his codefendant had given him money to purchase drugs.

As the Supreme Court recently emphasized in Holloway v. Arkansas, 435 U.S. 475, 489-490 (1978): "Joint

representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." In declining to make inquiry into whether joint representation had resulted in harmless error, the Court stated (435 U.S. at 490-491):

> ". . . in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process."

In Holloway, the Supreme Court held that whenever a trial court improperly requires joint representation in the face of timely motions for separate counsel, prejudice is presumed and a specific prejudicial conflict of interest need not be independently shown. Because of this holding, it was unnecessary for the Court to reach any conclusions as to actual prejudice to the defendants. Also, as the Court of Appeals for the Second Circuit has noted, the Supreme Court in Holloway "reserved judgment on the standard governing" cases, such as the ones at bar, where counsel does not make a timely motion for separate

representation.* United States v. De Fillipo, supra, slip opin. at 841 n.14. However, the Supreme Court's view of the nature of the evil created by joint representation of conflicting interests, as described above, was one of the main bases for its decision to presume prejudice and to decline to inquire whether joint representation had resulted only in harmless error. 435 U.S. at 490-491.

Implicit in the Court's reasoning in Holloway is that a mere lack of inconsistent defenses at the trial does not in itself establish an absence of prejudice. Indeed, a consistent defense at trial may actually be a reflection of a prejudicial conflict of interest between jointly represented defendants. As noted by Professor Geer in "Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney", 62 Minn. L. Rev. 119, 128 (1978)**:

> "If a defense is available to one defendant, but not to another, or if it would conflict with the

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* While there is a dispute as to whether trial counsel in these cases raised the issue of conflict (see discussion supra at 11-12), it is undisputed that no actual motion for relief was made and that, at best, an informal off-the-record request was made. Accordingly, although counsel for Laureano has cited the Holloway holding (Laureano post-argument mem. at 4), the petitioners do not rest their claims here on an alleged improper denial of a timely motion.

** Professor Geer's comprehensive article is cited approvingly in United States v. De Fillipo, supra, slip opin. at 842-843.

> defense of another, the attorney might seek to avoid weakening the defense of the latter by imposing an enforced harmony of defenses for the benefit of all defendants rather than asserting a separate defense for each. What may then emerge is a collective defense with no appearance of inconsistency on the trial record. As a result, one defendant is deprived of a potentially meritorious defense solely because of the multiple representation."*

The circumstances here amply demonstrate that there was "an enforced harmony of defenses" and a deprivation of potentially far more effective defenses which prejudiced the petitioners. The murder victim, Travieso, was killed by a single stab wound. The theory of the State's case was that the three defendants, acting in concert, had murdered Travieso. Since there was only the single stab wound, only one of the defendants could have inflicted the fatal wound. The other defendants were to be convicted on a showing of specific intent to commit murder in concert with the actual

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* That such deprivation may be a manifestation of prejudice accords with the general principle (in cases challenging adequacy of representation on grounds other than prejudice from joint representation) that inadequacy of representation may be shown by omissions as well as commissions. See summary description of such cases in Ennis v. LeFevre, 560 F.2d 1072, 1076 (2d Cir. 1977), cert. denied 435 U.S. 976 (1976).

assailant. Under the State's theory, and the Court's charge, it was not necessary for the jury to determine which of the defendants had stabbed Travieso so long as it found that one of them had. Thus, a finding of specific intent was of unusual significance.

The evidence was overwhelming that all three of the defendants were at the scene of the crime; they did not dispute this fact. Also, there was no question that the only other people at the scene of the crime were Travieso's family and friends and that their purpose in being there was to assist him.

A review of the unified, consistent defense presented at the trial establishes the hollowness of the argument that actual conflict or prejudice exists only where the defenses at trial are inconsistent. Counsel's defense strategy is illustrated by his summation. He urged that there was "not one scintilla of proof that these defendants killed anyone" (389, 391); he emphasized the conflicts in testimony as to what actually occurred at the scene of the crime and the confusion surrounding the event (390, 393-394); and he argued that, in the confusion, "It could have been any member of [Travieso's] friends or family" who killed him (393). Quite correctly, the prosecutor, in summing up,

made the following response to defense counsel's summation (402):

> "He is trying to say it was one of their own family. How ludicrous. How ludicrous. That's an insult to your intelligence."

Of course, the prosecutor's views as to the worthlessness of the defense are not controlling. What matters is that, under the circumstances, he was right.

As the respondents acknowledge, the identity of the actual assailant was not an issue in the case. See Gambale aff. at ¶29. Since the prosecution did not have to establish the identity of the actual assailant to obtain the conviction of all three defendants, a defense based upon the inability of the jury to identify the actual assailant was of extremely limited value. Moreover, there was undisputed evidence that all three defendants were at the scene of the crime and that the only other people there were family and friends of Travieso whose sole purpose was to assist him. Thus, the evidence was overwhelming that one of the defendants had fatally stabbed Travieso; for the jury to believe otherwise they would have had to attribute the crime to one of Travieso's family members or friends.

In the face of this compelling evidence that at least one of the defendants was guilty, defense counsel, in

order not to abandon any of the defendants he represented, was forced to take the non-contradictory, but extremely weak, position that all three were innocent and that Travieso might have been killed by one of his friends or a member of his family. He could not pursue any of the potentially effective defenses available to the individual defendants which would have benefitted one to the detriment of the others.

In view of the prosecution's position and the nature of the evidence, two lines of defense, precluded by joint representation, were particularly appropriate, namely, dissociating one defendant from the others and shifting the blame from one to another.

As noted in United States v. Glasser, 315 U.S. 60, 76 (1942), it is "especially important" that a defendant have the "undivided assistance of his counsel" in conspiracy cases. "[T]he very nature of [a conspiracy] charge suggests the desirability of dissociation." Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied 395 U.S. 964 (1969). In United States v. Lovano, supra, 420 F.2d 769, the appellants had been charged with conspiracy to violate federal counterfeiting laws. Appellants, who had been jointly represented at their trial, argued that one's defense of entrapment and the other's defense which denied the conspiracy were inconsistent. The Court rejected this claim since they

had been "involved in completely different aspects of the conspiracy" and, therefore, their defenses were not inconsistent. 420 F.2d at 774. However, the Court noted that "[I]f the relationship between appellants was such that Genova could have implicated Lovano, or Lovano could have proved that Genova played a greater role in the counterfeiting scheme than he claimed," the allegation of conflict "would have merit". Id.

Dissociation and shifting the blame were particularly indicated in this acting in concert case because of the differences in the evidence as to each defendant and because only one of the defendants could have inflicted the fatal wound. While petitioners' counsel could (and did) argue, in a conclusory way, that the individual defendants had no specific intent to commit murder, such an argument, unaccompanied by a meaningful attempt to distinguish and disassociate one defendant from the others, is largely an exercise in rhetoric. Counsel lacked an essential tool for making such a defense, namely, the freedom to shift the blame for the actual stabbing to a codefendant and then dissociate his client. He could not effectively present the defense that one — or two — of the defendants did not have the requisite intent because to do so would have

inculpated the remaining defendant or defendants.*

In a case in another Circuit, the Court accepted a claim of prejudice based on facts similar to those at bar. In Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975), four teenagers, prisoners at the Florida Industrial School at Marianna, were convicted of murdering a boy who had been found dead in the cell where nine boys were confined together. The other four boys testified for the prosecution that the defendants had held the victim down and choked him with a stick. The defense claimed that the murder had been accomplished by the four prosecution witnesses and not the four defendants. Under this theory, which the State termed "united we stand, divided we fall", each defendant shared the same interest in discrediting the prosecution witnesses, and the common defense did not appear to create conflicting interests. But the Court found that a conflict existed in the initial choice of defense strategies which precluded counsel from defending Foxworth by shifting the responsibility to a codefendant. The Court found that a strategy of shifting the blame was a realistic alternative

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* As to the significance of the lack of specific intent defense in circumstances like this and the corollary significance of the relationship between the codefendants, see People v. May, 9 AD2d 508, 509-513 (1st Dept. 1960).

since one 17 year old defendant was the oldest boy in the group and the evidence against him was more directly damaging than the evidence against Foxworth.

The circumstances here are even more indicative of a prejudicial conflict than those in Foxworth. In Foxworth, apparently all the defendants were charged as principals in the murder. There was not the special situation involved here that only one defendant could have been the actual assailant. In addition, in Foxworth, the united defense actually presented had the virtue of being plausible; the argument that the murder was done by the four prosecution witnesses, rather than by the four defendants, was not inherently unreasonable but, rather, was supported by some evidence. Here, as already described, the unified defense was hopelessly ineffectual.

Thus, the cases at bar involve more than the existence of a separate, non-conflicting defense available to one defendant but not the other. Cf. Kaplan v. Bombard, supra, 573 F.2d at 713. And they involve more than a mere disparity in the quantity of evidence against each of the defendants. Cf. United States ex rel. Ross v. La Vallee, 448 F.2d 552, 555 (2d Cir. 1971). Here, the peculiar nature of the evidence and the theory of the prosecution's case made prejudice from joint representation at the trial virtually

inescapable.

An examination of Bonilla's testimony, and of the circumstances giving rise to that testimony, support this conclusion. That Bonilla's statements were exculpatory of his codefendants, does not establish an absence of prejudice from his testimony. See Austin v. Erickson, 477 F.2d 620, 623-624 (8th Cir. 1973). As stated in Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968), there is a special danger of prejudice

> ". . . where there is a question as to whether either or both of the defendants should take the stand. This kind of decision, difficult enough where two defendants at the same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel. The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are representated by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the

take the stand is almost inescapable."*

See Geer, supra, 62 Minn. L. Rev. at 130 n.39, 129-131. See also United States v. DeBerry, supra, 487 F.2d at 453. On the other hand, that Bonilla was the only defendant who testified does not in itself establish prejudice. In Kaplan v. Bombard, supra, 573 F.2d at 713, the petitioner claimed that the testimony of one of three codefendants concerning that codefendant's lack of motive had in turn emphasized the motive of the other two. In rejecting this argument, the Court of Appeals noted that the prosecution had charged uniform participation by each defendant, that there was a common interest in attacking the credibility of the State's witnesses and that, to the extent the testimony of the codefendant impugned the credibility of the State's witnesses, it aided in the defense of the other two defendants. Id.

The circumstances at bar are significantly different from those involved in Kaplan. Here, the special danger

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* In his affidavit, at paragraph seven (attached to Bermudez pet.), trial counsel Stanley L. Siegel describes the decision made here. He states that he determined at trial that defendants' view of the case should be presented. He goes on to say: "I then had to decide which of the versions of the events related by the defendants was least harmful to the other defendants on trial. JOSE BONILLA's version, which he testified to at the trial, did not harm the other defendants and that is why I selected him to testify and why I chose not to put the other defendants, BERMUDEZ and LAUREANO, on the stand."

described in Morgan, supra, was not avoided. The theory of the State's case and the nature of the evidence demonstrate that uniform participation was not charged. Rather, the State relied on an acting in concert charge to convict three defendants without the need for identifying the actual, single assailant. Accordingly, the freedom of each defendant to develop individualized defenses involving a non-neutral posture toward one or both of his codefendants was essential.

Compare United States v. Wisniewski, supra, 478 F.2d 274, 281-285, where after the trial court had made "repeated searching inquiries" (p. 284) into potential conflicts of interest and both the defendants and their counsel had affirmed that none existed, the defendants, who were charged with the knowing receipt and concealment of stolen automobiles, presented a unified defense of lack of guilty knowledge. Unlike the unified defense presented here, nothing in the nature of the charge or the evidence made that defense unrealistic. Under the circumstances in Wisniewski, the Court rejected the claim that joint counsel had improperly failed to call one of the defendants to the stand and develop an individualized defense for him.

Here, only by abandoning Bonilla could counsel have "cross-examined" him in an attempt to establish that the others had not acted with him. Thus, that Bonilla's statements

on the witness stand did not implicate his codefendants but, rather, tended to exculpate them, is not sufficient to establish a lack of prejudice. See Austin v. Erickson, supra, 477 F.2d at 623-624. Moreover, although Bonilla's testimony did not harm his codefendants directly, it did do so indirectly. Bonilla's testimony was impeached by a statement he gave prior to trial that directly contradicted his trial testimony. Because of the "enforced harmony" of their defense, the codefendants were necessarily associated with this impeached witness.

While the above-described circumstances sufficiently establish the prejudicial nature of the joint representation, a separate instance of prejudice existed at the plea bargaining stage. The Supreme Court in Holloway v. Arkansas, supra, 435 U.S. at 490, noted that the joint representation in that case "may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution . . . ." For an extensive discussion of the dangers of joint representation at the plea bargaining stage see Geer, supra, 62 Minn. L. Rev. at 125-127. Bermudez argues here that separate counsel would have been able to bargain separately with the prosecution and, therefore, could have bargained on his individual behalf for something more favorable than what, on an all or nothing

basis, was offered to the three defendants. Under the circumstances of this case, where uniform participation of all three defendants was not charged, it is my conclusion that the absence of independent counsel free to negotiate individually on behalf of each defendant deprived the petitioners of effective legal assistance at one of the most significant stages of their criminal case.

Smith v. Regan, supra, 583 F.2d at 76, relied upon by the respondents for the position that there was no prejudice at the plea bargaining stage is distinguishable; indeed, if anything, a proper analysis of the Court's reasoning in Smith supports the conclusion here. While here as in Smith the prosecutor offered only a "package" deal, other factors significant to the decision in Smith are not present here. In Smith there was overwhelming evidence of the guilt of Smith as well as his codefendant; the defendants were offered an identical plea, and there was not "the slightest indication" that a separate bargain might have been obtained for Smith by separate counsel "since the prosecutor had an iron-clad case against both defendants, with four witnesses who could (and did) positively identify" both of them as the robbers.

Here, although there was overwhelming evidence that one of the three codefendants had killed Travieso, there

was by no means overwhelming evidence as to which defendant had done so; indeed, the prosecutor did not even attempt to establish which had done so. Nor can it be said that there was overwhelming evidence that either Bermudez or Laureano had the requisite intent to be held responsible for the crime even if he did not stab Travieso. Also, here, in contrast to Smith, the State offered an all or nothing plea in which one defendant would get a very long sentence and the others would get shorter sentences. This was an acknowledgement by the State that only one of the three defendants could have done the actual stabbing and that, therefore, the case against the three defendants was not essentially the same. Thus, it cannot be said that the State could have no interest in obtaining from one or two of the defendants a plea and an agreement to testify for the prosecution. If, for example, the State had been required to prove its case against Bonilla, it cannot be said that it would have made no sense for the State to accept a plea to a lesser offense from Laureano or Bermudez or both.

In sum, were the burden on the petitioners to show the existence of prejudice, I would conclude that they have amply met that burden. At the least, if the shift in burden is to be accorded any significance, the State cannot be said

to have met its burden of establishing the absence of prejudice.*

Copies of this report and recommendation are being mailed today to counsel for all parties, who are hereby advised that they may serve and file written objections or comments with the Court, with a copy to me, within 10 days.

Respectfully submitted,

Nina Gershon

NINA GERSHON
United States Magistrate

DATED: New York, New York
April 13, 1979

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* Both counsel for the respondents, who bear the burden on the prejudice issue, and counsel for the petitioners indicated at oral argument that there was no need for an evidentiary hearing as to prejudice. I agree with counsels' assessment that all material facts are presently before the Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1806

DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and
JOSE BONILLA,

Respondents.

AFFIDAVIT OF SERVICE

HILLARD WIESE, a member of the bar of this Court hereby certifies that on April 16, 1981, a copy of the petition was received in this case and on May 15, 1981, he mailed a true copy of the Motion for permission to Appeal In Forma Pauperis and the brief for Respondent Bonilla in opposition herein to Hon. Mario Merola, District Attorney, Bronx County, 215 East 161st Street, Bronx, New York 10451, counsel for petitioners and Ruth Kessel, Esq., Prisoners' Legal Services of New York, 20 Vesey Street, New York, New York 10007, counsel for Respondent Laureano. He has not served Respondent Bermudez who is no longer represented by counsel and whose present whereabouts are unknown.

HILLARD WIESE

Sworn to before me this

15th day of May, 1981

CLAUDIA VAN WYK
Notary Public, State of New York
No. 31-4733225
Qualified in New York County
Commission Expires March 30, 1982

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

RECEIVED
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SUPREME COURT, U.S.

NO. 80-1806

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO, and JOSE BONILLA,

Respondents.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent, Jose Bonilla, respectfully applies for leave to proceed in forma pauperis in connection with the filing of his brief in opposition to the petition for a writ of certiorari. In the appellate courts of New York, respondent was allowed to proceed as a poor person and was represented by the Legal Aid Society of New York. Such counsel have agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of the within application is annexed hereto.

Dated: New York, New York
May 7, 1981

Respectfully submitted,

Diana Budzanoski

DIANA BUDZANOSKI
WILLIAM E. HELLERSTEIN
15 Park Row - 18th Floor
New York, New York 10038
212 -577-3420
Counsel for Respondent Bonilla

IN THE

SUPREME COURT OF THE UNITED STATES

1981 TERM

NO.

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO, and JOSE BONILLA,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS IN FILING A BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATE OF NEW YORK)
) ss.:
COUNTY OF)

I, JOSE BONILLA, being first duly sworn depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed in filing a brief in opposition to the petition for a writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding; that I believe I am entitled to the redress ordered by the Court of Appeals for the Second Circuit.

I further swear that the responses which I have made to the questions and instructions relating to my ability to pay the cost of proceeding are true.

1. I am presently employed by National Viewtech Medford, N.Y. 11763 (516) 698-5600 I earn $130/week net. In the approximately 15 months since my release from prison pending a final determination of this case I have held several jobs. In my previous employment I received lower wages. I pay $40/week rent.

2. I have not received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, apart from that accruing on the savings account reported in paragraph 3, dividends or other sources.

3. I have a savings account with $500. I do not own any cash apart from my wages reported in paragraph 1.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is dependent on me for support. Occasionally I send a little money to my mother.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

JOSE BONILLA

Sworn to before me this
9th day of May, 1981

Notary Public

JOSEPH A. KOLLER
NOTARY PUBLIC, State of New York
No. 43-4178126, Suffolk County
Term Expires March 30, 1983